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No. 217.

In the Supreme Court of the United States.

OCTOBER TERM, 1928.

UNITED STATES OF AMERICA, APPELLANT,

v.

CHARLES J. FERRIS.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

The respondent was a Lieutenant Colonel in the National Army, attached to the 314th Regiment, Field Artillery.

On August 27, 1917, by special orders issued by the Commanding General of the 80th Division, he was placed in command of the 315th Field Artillery, there being no Colonel or Lieutenant Colonel with that regiment at that time. He immediately assumed command of that regiment, and remained in command thereof until the return to duty of the Lieutenant Colonel of said regiment on January 5, 1918.

NOTE.—The finding of the Court of Claims is that he was attached to the *315th* Regiment as Lieutenant Colonel, but this makes the findings unintelligible.

The petition alleges in paragraph two that he was Lieutenant Colonel of the *314th* Field Artillery, and was transferred from the regiment to the 315th Regiment, of which he was given command. Such was undoubtedly the fact, and there is evidently an error in the printing of the first paragraph of the findings of the Court of Claims. (See also the opinion of the Comptroller General, 1 Dec. Comp. Gen. 37.)

The 314th and the 315th Regiments of Field Artillery formed part of the 80th Division, one of the divisions organized for the purpose of carrying on the late war. The division was organized and trained at Camp Lee, Virginia, and later on became a part of the American Expeditionary Forces. During the period from August 27, 1917, to January 5, 1918, the period for which Colonel Ferris has been held entitled to the increased pay, the regiment was stationed at Camp Lee, Petersburg, Virginia, and the Camp was used as a camp of instruction.

The only point in the case is whether during the time of his command of the 315th Regiment he was entitled to the pay and allowances of a Colonel pursuant to the provision of Sec. 7 of the Act of April 26, 1898, c. 191, 30 Stat. 365, as follows:

> That in time of war every officer serving with troops operating against an enemy, who shall exercise, under an assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of

the grade appropriate to the command so exercised.

The Act is entitled "An Act for the better organization of the line of the Army of the United States."

The Court of Claims held in his favor. The contention of the Government is that he was not "serving with troops operating against an enemy."

ARGUMENT.

The question presented is a very simple one of statutory construction. The obvious purpose of the Act was to give to certain officers in time of war, under certain circumstances, an increase of pay over that ordinarily pertaining to their rank. To entitle them to this pay they must, in addition to the other conditions, be "serving with troops operating against an enemy."

The case presents the question of the meaning of the words "serving with troops operating against an enemy." The Court of Claims has held that troops in course of training and instruction in one of the great training camps were operating against an enemy. This conclusion seems to us to be unsound. The statute clearly recognizes the fact that, in time of war, there are troops operating against the enemy, and troops *not* operating against the enemy, and draws a distinction between them. If these words in the statute had been left out and the statute had merely provided that in time of war every officer serving with troops and exercising a command above that pertaining to his grade should have the additional

pay, Colonel Ferris would, of course, be entitled to it, but it seems to us that the decision of the Court of Claims has failed to draw the distinction which the words in the statute plainly imply. During this period the troops with which Colonel Ferris served were under instructions and training, fitting themselves for military service at a camp 3,000 miles away from any fighting or any operations of the kind commonly understood to be operations against an enemy. As a matter of common knowledge of which the court can take judicial notice, there were no military operations in the ordinary sense of the word carried on within the limits of the United States. The troops operating against the enemy were those overseas. It would never occur to anyone, we submit, in ordinary conversation or in writing or speaking of the war, to refer to the drafted men in the cantonments in this country, engaged in training to go overseas, as operating against an enemy. They were being fitted, drilled, and trained so that they might engage in such operations, and this particular regiment ultimately went overseas, where it undoubtedly engaged in such operations.

The *Century Dictionary and Encyclopedia*, volume 6, page 4121, gives the following definition:

> Operation: * * * 3. The course of action or series of acts by which some result is accomplished; process. * * * (*c*) In *War* the act of carrying out preconcerted measures by regular movements; as military or naval *operations*.

A most exhaustive dictionary, entitled "A New English Dictionary," edited by Doctor Murray, 1909, volume 7, p. 144, contains the following definitions:

> Operate (military and naval). To carry on warlike operations; see operations, 7.
>
> Operation 7 (military and naval). A series of warlike or strategic acts; a movement.

Wilhelm's Military Dictionary and Gazeteer, 1881 (p. 368):

> Operations, Military. Consist in the resolute application of preconcerted measures in secrecy, dispatch, regular movements, occasional encampments, and desultory combats or pitched battles.

Same authority, on page 341:

> Movements. A term used to express the changes of position which troops undergo in performing their evolutions.

The *Standard Dictionary* gives this definition:

> Operations. A course or series of acts to effect a certain purpose * * * as military *operations*.

In Farrow's Military Encyclopedia, by Edward S. Farrow, United States Army, late Assistant Instructor of Tactics in the United States Military Academy at West Point (1885), the following definition of operations is given:

> Operations.—Under the term Military Operations are included: Field operations; offensive and defensive operations; underground operations; siege operations, etc. All consist in the

> resolute application of preconcerted measures in secrecy, dispatch, regular movements, occasional encampments, and desultory combats or pitched battles.

From these definitions it is evident that the term "operating against an enemy," used in the statute, is not employed in common usage or by military practice to describe what goes on when bodies of men fresh from civil life are assembled in camps thousands of miles from the scene of active hostilities, to be made into soldiers; to be fitted for military duties under instruction, drilling, and training. They are clearly not engaged in operating against an enemy, within the meaning of the words as ordinarily used. Camp Lee was not a camp for defensive or offensive operations. It was a school for instruction, just as is West Point or Annapolis.

The Court of Claims bases its decision largely upon an opinion of the Attorney General, 22 Ops. A. G. 95, in which he held that troops assembled in camps in the United States during the Spanish War for war purposes could properly be considered as operating against an enemy under the statute. It is respectfully submitted that the reasoning of this opinion is not sound, and that to apply it to the present case is to fail to give any effect whatever to the words of the statute "serving with troops operating against an enemy." There is, of course, no desire or intention to disparage in the slightest degree the services rendered by officers in the training camps in this country, nor of the other officers who are not included

within the terms of the statute, for it is obvious that many discharging highly important and meritorious services are not included.

Many officers serving with troops in actual combat with the enemy are not included within the provisions of the Act. The title of the Act indicates that it applies only to "line" officers. To enjoy its benefits, an officer must "exercise a command"—that is, he must be a line officer. Staff officers do not exercise a command, and so are not included. *Truitt* v. *United States*, 38 Ct. Cl. 398. Thus the benefits are denied to a great number of officers performing highly important duties, bearing great responsibilities, which involve in many instances the gravest danger of injury and death.

The Opinion of the Attorney General (22 Ops. A. G. p. 95) concedes that, at the time it was rendered, all service in the Army was not to be considered as operation against an enemy, as, for example, the troops and their officers on the western frontiers performing garrison service. The Opinion quotes the following from a letter of the Paymaster General, which was the basis of the request of the Secretary of War for the Opinion:

> As yet, although war has been declared to exist between Spain and the United States, there are, in my opinion, with the exception of the troops embarked for the Philippine Islands, no troops "operating against an enemy."
>
> There is, within our borders, no enemy, within the meaning of the law, for troops to

> to operate against. An army has been called together, and is being drilled, disciplined, and prepared to operate against an enemy, but until that army embarks for a foreign country, or until an enemy appears on our shores, and the army confronts it, it is held that no officer can receive the pay of a higher grade by virtue of anything in the act referred to.

This it seems to us is more logical than the opinion of the Attorney General disapproving it.

In *United States* v. *Mitchell*, 205 U. S. 161, it was held that when an officer was assigned to a higher command by his corps commander, he could not, under this statute, recover the pay of the higher grade, when such command devolved upon him by seniority without the aid of the order assigning him thereto. In the Court of Claims it was urged that this principle prevented recovery by Colonel Ferris.

The Opinion of the Comptroller General (1 Decisions Comp. Gen., p. 37) rejecting the claim of Colonel Ferris, states that it is unnecessary to decide "whether he was operating against an enemy" within the meaning of the statute, because, he held, he would have commanded by virtue of seniority in accordance with the Army Regulations had no orders to take command been issued, citing *United States* v. *Mitchell*, 205 U. S. 161. This latter point, however, seems to be foreclosed by the finding of the Court of Claims that the order placing Colonel Ferris in command of the 315th Regiment was necessary to enable him to assume such command.

Though the amount involved in this particular case is trifling, the decision will control many others involving an aggregate amount so large that it is deemed proper by the Government to have it passed upon by this Court.

It is respectfully contended, therefore, for the reason stated, that the judgment of the Court of Claims should be reversed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

MARCH, 1924.

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